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**FEDERAL ELECTION COMMISSION**

999 E Street, N.W.  
Washington, D.C. 20463

**CELA**

**FIRST GENERAL COUNSEL'S REPORT**

MUR: 6190

DATE COMPLAINT FILED: 05/06/09

DATE OF NOTIFICATION: 05/13/09

LAST RESPONSE RECEIVED: 06/09/09

DATE ACTIVATED: 06/23/09

STATUTE OF LIMITATION: 07/27/12 -  
03/08/13

**COMPLAINANT:**

David W. Bearden

**RESPONDENTS:**

Kelly B. Bearden  
Norman R. Byrne  
Rosemary Byrne  
Byrne Electrical, Inc.  
Daniel P. Byrne  
Katherine Scudder  
Molly M. Nowak

**RELEVANT STATUTES  
AND REGULATIONS:**

2 U.S.C. § 441a(a)  
2 U.S.C. § 441f  
11 C.F.R. § 103.3(b)  
11 C.F.R. § 110.1(k)(3)  
11 C.F.R. § 110.4(b)

**INTERNAL REPORTS CHECKED:**

Disclosure Reports

**FEDERAL AGENCIES CHECKED:**

None

**I. INTRODUCTION**

Complainant alleges that Kelly Bearden, his estranged spouse, violated the Federal Election Campaign Act of 1971, as amended ("the Act") when she made a contribution in the amount of \$2,000 in his name to John McCain, 2008, Inc.,<sup>1</sup> ("the

<sup>1</sup> The Complaint did not name John McCain 2008, Inc. as a Respondent and CELA did not notify the Committee of the Complaint. As discussed below, we make no recommendations as to the Committee.

1 Committee" or "McCain Committee") the authorized committee of presidential candidate  
2 John McCain. Complainant alleges that the contribution was made by a check drawn on  
3 the couple's joint account without his knowledge or approval. The Complaint also  
4 alleges that in June of 2008, Kelly Bearden told the Complainant that her father, Norman  
5 Byrne, had directed family members and "some employees\ officers" of Byrne Electrical,  
6 Inc. to contribute to the McCain campaign and that Norman Byrne reimbursed those  
7 contributions. Complaint at 2.

8 Respondents deny the allegations. They assert the Complaint is motivated by the  
9 contentious divorce proceedings between the Complainant and Respondent Kelly  
10 Bearden. Bearden acknowledges making a contribution from the couple's joint account;  
11 however, she asserts that the contribution was made with personal funds and was not  
12 reimbursed by Norman Byrne or any other person. All Respondents assert that the  
13 allegations in the Complaint are speculative and lack factual support, and they seek  
14 dismissal of the Complaint.

15 Based upon the Complaint, the Responses, and other available information, we  
16 recommend that the Commission find no reason to believe that Respondents violated  
17 2 U.S.C. § 441f and close the file in this matter.

18 **II. FACTUAL AND LEGAL ANALYSIS**

19 **A. Factual Background**

20 Complainant received a letter dated September 4, 2008, from the McCain  
21 Committee that thanked him for his contribution and sought to obtain the Complainant's

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1 occupation and employer information.<sup>7</sup> Complaint Exhibit B. The letter did not specify  
2 the date, amount, or circumstances of the Complainant's contribution. The Complaint  
3 suggests that this September 4 correspondence was the Complainant's initial notice that a  
4 contribution had been made in his name to the Committee. Complainant asserts that this  
5 contribution was made without his knowledge or approval and that his access to the joint  
6 account, from which the contribution was made, was limited to ATM and credit card  
7 transactions. Complaint at 1. Complainant asserts that contributing to any political  
8 candidate violates his personal beliefs, and in March of 2008, Kelly Bearden had  
9 "represented to [him] that the household was under severe financial distress." *Id.* at 2.

10 Complainant also alleges that in June of 2008, Bearden told him that Norman  
11 Byrne "reimbursed her, all direct family members and some employees\ officers of Byrne  
12 Industrial Specialists Incorporated that made similar contributions to the McCain  
13 campaign at Mr. Byrne's direction because Mr. and Mrs. Byrne had reached the lawful  
14 financial limit." Complaint at 2. In support of this allegation, Complainant provided a  
15 chart listing contributions made by Byrne family members to the McCain Committee by  
16 date and amount, indicating contributions from several Byrne family members on the  
17 same day on three occasions during 2007-2008. See Complaint Exhibit C.

18 According to Bearden's Response, in February of 2008, she made a contribution  
19 to the McCain Committee with a check drawn on the joint account she and the  
20 Complainant maintained. The names of both the Complainant and Bearden were

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1 imprinted on the check, and each had access to the account funds. Bearden Response at  
2 2-4. The couple's monthly account statement shows that check number 8682 in the  
3 amount of \$2,300 was paid on March 11, 2008. *See* Complaint Exhibit A. Bearden  
4 asserts that this contribution was intended as a joint contribution to the McCain  
5 Committee, and, in fact, the Complainant "not only enthusiastically attended the [related]  
6 fundraiser for Sen. McCain but also got his picture taken with Sen. McCain and proudly  
7 displayed said photograph in a prominent location in his living room." Bearden  
8 Response at 3; *see also* Bearden Affidavit at 2. Bearden claims that "Complainant now  
9 wishes to rescind his portion of a joint-contribution that was made with his wife, which  
10 he is now -- more than a year after the fact -- claiming that he didn't authorize or  
11 support." Bearden Response at 2. Bearden also asserts that the contribution to the  
12 McCain Committee is consistent with other contributions that the couple made jointly to  
13 political and charitable organizations. Bearden Response at 3; *see also* Bearden Exhibit  
14 1.<sup>3</sup> Only Bearden signed the check and forwarded the contribution to the McCain  
15 Committee. *Id.* at 4.

16 All Respondents assert that the timing and filing of the Complaint is motivated by  
17 the contentious divorce proceedings between the Complainant and Kelly Bearden and  
18 specifically deny the allegations of the Complaint. Respondents also provided sworn  
19 affidavits attesting that they have previously made contributions to candidates on the state  
20 and federal levels, all their contributions were made with personal funds, and neither  
21 Norman Byrne nor any other individual or entity reimbursed them for their contributions

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<sup>3</sup> Exhibit 1 consists of three letters dated October 23, 2006, January 24, 2007, and February 2, 2007, reflecting joint charitable donations made by Complainant and Kelly Bearden. None of the three donations were to state or federal political candidates or parties.

1 to the McCain Committee. *See* Affidavits of Norman Byrne, Daniel Byrne, Molly  
2 Nowak, Katherine Scudder, and Kelly Bearden.

3 **B. Analysis**

4 **1. Spousal Reimbursement Allegation**

5 The Act limits an individual's contributions to a candidate or his authorized  
6 committee to an aggregate of \$2,300 per election for the 2008 election cycle.  
7 2 U.S.C. § 441a(a)(1)(A). The Act also prohibits contributions made in the name of  
8 another. 2 U.S.C. § 441f.<sup>4</sup> Further, no person shall knowingly permit his or her name to  
9 be used to make such a contribution or knowingly accept a contribution made by one  
10 person in the name of another. *Id.* Examples of contributions in the name of another  
11 include:

- 12 (i) giving money or anything of value, all or part of which was provided to  
13 the contributor by another person (the true contributor) without disclosing  
14 the source of money or the thing of value to the recipient candidate or  
15 committee at the time the contribution is made, or  
16 (ii) making a contribution of money or anything of value and attributing as the  
17 source of the money or thing of value another person when in fact the  
18 contributor is the source.  
19 11 C.F.R. § 110.4(b)(2)(i)-(ii).

20 Complainant alleges that Kelly Bearden made the March 11, 2008, contribution in  
21 the amount of \$2,000 to the McCain Committee in his name and thus violated the Act.

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<sup>4</sup> On June 8, 2009, the federal district court in the Central District of California dismissed two counts of a criminal indictment wherein the federal government alleged that Pierce O'Donnell violated 2 U.S.C. § 441f by reimbursing conduit contributions to the 2004 presidential campaign of Sen. John Edwards. The district court ruled in part that section 441f did not apply to indirect contributions made through a conduit or intermediary. The U.S. Department of Justice filed a notice of appeal to the Ninth Circuit. *U.S. v. O'Donnell*, C.D. Cal. No. 08-872, *appeal docketed*, No. 90-567 (9<sup>th</sup> Cir. June 16, 2009). The conduct in the O'Donnell matter occurred in the 9<sup>th</sup> Circuit. The alleged activity in MUR 6190 took place in the 7<sup>th</sup> Circuit. Excluding the O'Donnell dismissal, numerous federal district courts in the Second, Third, Fourth, Ninth, Tenth, and Eleventh Circuits have found violations of section 441f for reimbursing conduit contributions. On July 28, 2009, the Commission authorized the Office of General Counsel to file an amicus brief in the O'Donnell matter.

1 *See* 2 U.S.C. § 441f. Bearden denies the allegation. According to her Response, she and  
2 the Complainant both intended to make the contribution. However, only she signed the  
3 \$2,300 check to the McCain Committee. According to the Committee's disclosure  
4 reports, Bearden had previously contributed \$1,000 to the Committee on July 27, 2007,  
5 and \$1,000 on January 22, 2008. These contributions were designated for the primary  
6 election. Another \$2,300 from Bearden on March 11, 2008, would bring her aggregate  
7 contribution to \$4,300 for the primary and would have resulted in an excessive  
8 contribution to the McCain Committee. *See* 2 U.S.C. § 441a(a)(1)(A).

9 Pursuant to the Commission's regulations, committee treasurers are responsible  
10 for ascertaining whether contributions received, when aggregated with other  
11 contributions from the same contributor, exceed the contribution limitations. 11 C.F.R.  
12 § 103.3(b). If a treasurer determines that a contribution exceeds the contribution  
13 limitations, the treasurer has sixty (60) days to refund the excessive contribution, or  
14 obtain a written redesignation or reattribution of the excessive portion. 11 C.F.R.  
15 § 103.3(b)(3). If the committee receives an excessive contribution made by a written  
16 instrument imprinted with the name of more than one individual, yet signed by only one  
17 individual, Commission regulations allow for presumptive reattribution of the excessive  
18 portion to the other individual who did not sign a joint instrument, provided it does not  
19 result in an excessive contribution for any contributor. 11 C.F.R. § 110.1(k)(3)(ii)(B)(1).  
20 The committee must notify each contributor of this action within 60 days of the receipt of  
21 the contribution and must offer the contributor the option to receive a refund. 11 C.F.R.  
22 § 110.1(k)(3)(ii)(B)(2)-(3).

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1 Bearden acknowledged that the Complainant did not sign the \$2,300 check for the  
2 March 11, 2008, contribution. See Bearden Response at 4. The Committee's 2008 April  
3 Quarterly Report memo entry for the March 11, 2008, contribution from Bearden states  
4 "retribution to spouse." The available information suggests that upon receipt of the  
5 \$2,300 contribution from Bearden on March 11, 2008, the McCain Committee  
6 reattributed the \$2,000 excessive portion to the Complainant, whose name was also  
7 imprinted on the check.<sup>5</sup> Neither the Complainant nor Bearden provided information as  
8 to whether the McCain Committee notified either individual of the excessive contribution  
9 and offered a refund. See 11 C.F.R. § 110.1(k)(3)(ii)(B)(2)-(3). Subsequently, the  
10 Committee forwarded the September 4, 2008, letter to the Complainant requesting  
11 occupation and employer information in connection with his contribution. Thus, it does  
12 not appear that Kelly Bearden made a prohibited contribution in the name of another, but  
13 rather made an excessive contribution to the McCain Committee that was reattributed to  
14 the Complainant. See 2 U.S.C. § 441a(a)(1)(A); 11 C.F.R. § 110.1(k)(3). In view of the  
15 circumstances of the Committee's retribution of the excessive contribution to the  
16 Complainant, we make no recommendation regarding a violation of 2 U.S.C.  
17 § 441a(a)(1)(A) by Kelly Bearden. Further, the available information does not indicate  
18 whether the McCain Committee provided the required notice to Complainant and  
19 Bearden regarding the retribution of Bearden's excessive contribution, see 11 C.F.R.

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<sup>5</sup> The Complaint and Bearden's Response both recognize this process. See Complaint at 1 and Bearden Response at 4.

1   § 110.1(k)(3)(ii), but in view of the small amount at issue, \$2,000, we make no  
2   recommendations regarding this activity.<sup>6</sup>

3                   **2.     Family Reimbursement Allegation**

4           Complainant also alleges that Norman Byrne reimbursed contributions to the  
5   McCain Committee made by "family members and some employees\ officers" of Byrne  
6   Electrical, Inc. Complainant alleges that Kelly Bearden told him of these reimbursements  
7   "on or around June 2008...." Complaint at 2. Complainant also provided a chart listing  
8   family member contributions to the McCain Committee indicating multiple family  
9   member contributions on the same day on three occasions. Complaint Exhibit C.

10          Respondent Norman Byrne denies by affidavit that he ever reimbursed, directly or  
11   indirectly, contributions made by any family member or individual affiliated with Byrne  
12   Electrical, Inc. Norman Byrne Affidavit at 1-2. Daniel Byrne, Molly Nowak, and  
13   Katherine Scudder similarly deny by affidavits that they received funds for their  
14   contributions from Norman Byrne or any other source.<sup>7</sup> Respondents aver that they have  
15   a personal history of making contributions with their personal funds to political  
16   candidates on the state and federal level as well as to charitable organizations. *See*

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<sup>7</sup> Respondents Rosemary Byrne and Byrne Electrical, Inc. filed short responses seeking dismissal of the Complaint because it fails to allege any action taken by either respondent that would constitute a violation of the Act. In Rosemary Byrne's Response, she notes the Complaint's sole reference to her is the following sentence, "On or around June 2008 Kelly Bearden stated to me that she made contributions to the McCain campaign at her father Norman Byrne's request because he and his wife Rosemary Byrne had already reached the legal limit." Rosemary Byrne Response at 1. Similarly, Byrne Electrical, Inc.'s Response also notes that the Complaint fails to allege any specific violations by the corporation, and asserts that even if Norman Byrne had reimbursed political contributions made by his family members, that would constitute a violation of the Act by Mr. Byrne, not Byrne Electrical. Byrne Electrical, Inc. Response at 1-2.

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1 Affidavits of Norman Byrne, Daniel Byrne, Molly Nowak, Katherine Scudder and Kelly  
2 Bearden.<sup>5</sup>

3 Further, Kelly Bearden specifically denies that she informed the Complainant that  
4 Norman Byrne requested that she and her siblings contribute to the McCain campaign.  
5 Bearden Affidavit at 2. In her response, Bearden asserts that as a result of the contentious  
6 and on-going divorce proceedings between her and the Complainant, as of May of 2008,  
7 the primary means for communication between the two was through counsel. Bearden  
8 Response at 2. Bearden declares in her affidavit that she did not discuss the political  
9 contributions of her father or other family members with the Complainant. See Bearden  
10 Affidavit at 2.

11 Considering that the allegation is limited to a single alleged statement by Kelly  
12 Bearden supported only by the Complainant's list of Respondents' contributions to the  
13 McCain Committee, there does not appear to be a sufficient basis to open an investigation  
14 in this matter. Although there are similarities in the dates and amounts of Respondents'  
15 contributions, this information is insufficient to support the Complainant's allegation that  
16 Norman Byrne reimbursed Kelly Bearden, Daniel Byrne, Katherine Scudder and Molly  
17 Nowak for contributions they made to the McCain Committee.

18 **C. Conclusion**

19 Based upon the available information, we recommend that the Commission find no  
20 reason to believe that Kelly B. Bearden, Norman R. Byrne, Rosemary Byrne, Byrne  
21 Electrical Inc., Daniel P. Byrne, Katherine Scudder, or Molly M. Nowak violated 2 U.S.C.  
22 § 441f and close the file in this matter.

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<sup>5</sup> However, the Commission's database does not indicate any previous contributions to federal committees by Kelly Bearden, Katherine Scudder, or Molly Nowak.

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**III. RECOMMENDATIONS**

1. Find no reason to believe that Kelly B. Bearden, Norman R. Byrne, Rosemary Byrne, Byrne Electrical Inc., Daniel P. Byrne, Katherine Scudder, or Molly M. Nowak violated 2 U.S.C. § 441f.
2. Approve the attached Factual and Legal Analysis.
3. Approve the appropriate letters.
4. Close the file.

Thomasenia P. Duncan  
General Counsel

9/17/09  
Date

BY:

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